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NO. 79-6799

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

RICHARD MICHAEL MORRIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does a unified probation revocation proceeding satisfy the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution as applied in Georgia in Ga. Laws 1966, p. 440 [Ga. Code Ann. § 27-2713]?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. I

STATEMENT OF THE CASE. 1

REASONS FOR NOT GRANTING THE WRIT

I. A UNIFIED PROBATION REVOCATION HEARING SATISFIES THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 2

II. PETITIONER FAILED TO RAISE THE REMAINING ISSUES IN THE COURTS BELOW. 7

CONCLUSION. 8

CERTIFICATE OF SERVICE. 9

TABLE OF AUTHORITIES

Cases Cited:

Page

Cardinale v. Louisiana, 394 U.S. 437 (1969). 7

Gagnon v. Scarpelli, 411 U.S. 778 (1973). 2

Morris v. State, 153 Ga. App. 415, 265 S.E.2d 337 (1980). 1

Morrisey v. Brewer, 408 U.S. 471 (1972). 2

Stephens v. State, 245 Ga. 835, ___ S.E.2d ___, (1980) [Case No. 35921, decided May 27, 1980]. 7

Tacon v. Arizona, 410 U.S. 351 (1973). 7

United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976). . 5

United States v. Tucker, 542 F.2d 77 (5th Cir. 1975). . . 5

Ware v. State, 137 Ga. App. 673, 244 S.E.2d 873 (1976). 2

Statutes Cited

Ga. Code Ann. § 27-2713. . . . . I, 2, 3

Ga. Code Ann. § 27-2727. 1

PART ONE

STATEMENT OF THE CASE

Petitioner, Richard Michael Morris, violated Georgia's Controlled Substances Act, entered pleas of guilty to two counts in the Superior Court of Gwinnett County, Georgia, and was sentenced as a first offender under Ga. Code Ann. § 27-2727. Under that statute, Petitioner's concurrent sentences of five years and one year were probated and, as a first offender, Petitioner did not have a judgment of guilt entered against him at that time.

Thereafter, Petitioner violated the conditions of probation by selling cocaine. A petition for adjudication of guilt and imposition of sentence was filed and notice was given to Petitioner and his attorney. A hearing was afforded Petitioner at which time evidence was presented establishing his guilt of the subsequent offense and at which he was afforded an opportunity to present evidence in his own behalf. After considering the evidence, the court entered an adjudication of guilt and, in effect, revoked probation.

From the adjudication of guilt and imposition of sentence Petitioner appealed to the Court of Appeals of Georgia, asserting that the trial court erred in adjudging Morris guilty and revoking probation. The convictions were affirmed in Morris v. State, 153 Ga. App. 415, 265 S.E.2d 337 (1980). The application for certiorari filed in the Supreme Court of Georgia was denied May 19, 1980. From these adverse decisions Morris petitioned this Court.

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PART TWO

REASON FOR NOT GRANTING THE WRIT

I. A UNIFIED PROBATION REVOCATION HEARING SATISFIES THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's primary argument is that a bifurcated probation revocation proceeding is required by Ga. Code Ann. § 27-2713 by virtue of this Court's holdings in Morrisey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Reduced to essentials, Petitioner's argument is that a preliminary hearing to establish probable cause to conduct such a revocation hearing should have preceded the evidentiary hearing. Georgia courts have determined that due process is satisfied in a single disposition by the trial court. Ware v. State, 137 Ga. App. 673, 675, 224 S.E.2d 873 (1976). In Ware the Court of Appeals held:

> Since all of these due process requirements can be satisfied in a single court trial as was done in the instant case, we see no reason for duplication in the form of a preliminary hearing. The Supreme Court's directives are met and a probationer's constitutional rights are fully protected through a single dispositional hearing where, as here, the procedure included these successive steps: (1) a petition filed by the probation supervisor in the court where the original probation sentence has been entered; (2) such petition reciting

> (a) details of the original trial including nature of the offense, defendant's plea, the court's sentence and date thereof with a copy of the terms and conditions of the probation sentence; (b) specificity as to alleged violations of the probation conditions; (c) prayer for citation, petition for revocation and for a rule to show cause; (3) consideration of the petition by trial judge and his entry of an order requiring service of a copy of the petition and a show cause ruling for a specified date, time and place in open court; (4) service of the petition and court order; (5) a full fledged hearing in accordance with Code Ann. § 27-2713; and (6) a judicial determination in writing by the court stating the particulars in which the terms of the probation had been violated and a recital as to the specific term that remains to be served.

Id. at 675. The proceedings in Morris's case satisfied the foregoing requirements. A petition was filed setting forth the particulars of the violation and specifying the probated sentence which had been violated, notice was given to Petitioner and a show cause order entered, there was a full hearing in accordance with Ga. Code Ann. § 27-2713, and the court reduced its determination of the case to writing.

Furthermore, Petitioner did not raise this procedural objection in the hearing court. On the contrary, although the petition was served on Morris and he refused to sign it or otherwise

acknowledge receipt, when asked "[I]s there any question but that he has had adequate notice. . . ?" the attorney responded "No, sir." (T. 3). The hearing court then inquired if there was any "reason why we should not proceed at this time. . .?" Again, the response was "No, sir." (T. 3). Thereafter, the state called as witnesses, among others, the police agent to whom Morris had sold the cocaine and the chemist who had tested the substance and determined it was positive for cocaine. (T. 14-15, 47).

Petitioner bases his argument on the holding in Morrisey, supra, which is made applicable to probation revocation hearings through Gagnon, supra. Petitioner contends that this Court has mandated the holding of a preliminary revocation hearing as well as a final revocation hearing. However, this argument ignores what this Court said in Morrisey: "We cannot write a code of procedure; that is the responsibility of each state. . . . Our task is limited to deciding the minimum requirements of due process." Id. at 488. Petitioner contends that the aforementioned cases establish as minimum requirements the holding of two hearings. But this Court was not concerned with the number of hearings held; the concern, then and now, is with whether a probationer is afforded that process which is due. The Court of Appeals of Georgia was cognizant of this Court's holdings when it held in Ware, supra, that the due process requirements of Morrisey could be satisfied in a single proceeding. All of the directives contained in Morrisey were followed in the single dispositional hearing which was afforded in the present case. As previously noted, the petition was filed, notice was given, an order to show cause was issued, Petitioner was present in court with counsel, a full hearing was held, and the judgment was reduced to writing; in short, Petitioner was afforded all his due process rights. In no way did the

holding of a single hearing deny Petitioner any constitutional rights to which he was entitled.

Indeed, Petitioner does not contend that minimal due process requirements were not met in the single dispositional hearing; rather, he argues that such requirements must be conducted in a two stage proceeding. However, in Morrisey, this Court in setting down the minimum due process requirements began with the proposition that revocation is not a part of the criminal prosecution; consequently, the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation. Id. at 480. "Due process is flexible and calls for procedural protections as the particular situation demands. . . Its flexibility is in its scope once it has been determined that due process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kinds of procedure. . . We have no thought to create an inflexible structure for probation revocation process. . . Control over the required proceedings by the hearing officer can assure that delaying tactics and other abuses do not occur." Id. at 481, 490.

Respondent does not dispute the fact that a probationer is entitled to some minimal inquiry reasonably soon after an arrest which subsequently leads to revocation while the information is fresh and sources are available. However, when a probationer or parolee is not being held in custody to await the revocation hearing, the reason for requiring a preliminary hearing does not exist. United States v. Tucker, 542 F.2d 77 (5th Cir. 1975); United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976).

In Sciuto, the court addressed the notice argument and found that a defendant's right to reasonable notice of the nature of the charged violation and an opportunity to meet the evidence can

be satisfied by means other than a preliminary hearing. In the present case notice was provided not only to the Petitioner but to his attorney as well. In Tucker, supra, the probationer at the time of the attempted revocation was confined pursuant to a final conviction. The court held that there was no requirement for a preliminary hearing in addition to a final revocation hearing because there was no immediate loss of freedom requiring an immediate probable cause hearing.

In this case it cannot be said that the Petitioner has suffered a deprivation of an interest in liberty within the meaning of the due process clause. Although the proceedings were unified, rather than duplicative, the due process standards enunciated in Morrisey, supra, and Gagnon, supra, have been satisfied.

Petitioner has failed to demonstrate any actual prejudice, since he received adequate notice and was given a hearing within a reasonable period of time. Petitioner has the burden of proving prejudice, and he has neither asserted grounds or established prejudice. The hearing afforded him was reasonable both in time and in the evidence produced. This Court in Morrisey laid down a suggested procedure but not a restrictive one; the Court explicitly noted the need for flexibility and the responsibility for establishing such procedures which rested with the state. The single dispositional hearing held in the present case met and exceeded the minimal requirements set forth in Morrisey. To require dual hearings when a single hearing provides all the process due a probationer is to exalt form over substance and should not be the basis of granting the petition for a writ of certiorari.

II. PETITIONER FAILED TO RAISE THE REMAINING ISSUES IN THE COURTS BELOW.

Petitioner seeks to present other grounds to this Court as grounds for granting the writ. However, but for the issue previously discussed, none was raised in the courts of Georgia. This Court does not review issues presented for the first time in this manner. See, e.g., Tacon v. Arizona, 410 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969).

However, the fourth contention raised by Petitioner concerning the disallowance of a set-off for time spent on probation as a first offender has been addressed recently by the Supreme Court of Georgia in Stephens v. State, 245 Ga. 835, ___S.E.2d___(1980) [Case No. 35921, decided May 27, 1980]. In Stephens, the court held "that when a probationer is sentenced to serve time in a penal institution for the offense for which he has spent time on probation, that probation time must be credited to any sentence received, including cases involving first offender probation." Id. at 837. In disallowing imposition of the entire sentence, the court noted that "[t]here is nothing in the record to indicate that Stephens was told he could get a higher sentence or that he would not be credited for time served on probation." Id. The court further stated that an accused is entitled to rely on the provisions of a sentencing document if he is not informed to the contrary when a sentence is imposed. In the instant case, whether Petitioner is entitled to a set-off under the holding in Stephens is a question that has not been but may be presented by Petitioner to the courts of Georgia. The issue has neither been raised nor considered in Petitioner's case below and is not properly presented to this Court.

The remaining allegations presented by Petitioner do not provide any basis for granting the writ of certiorari.

CONCLUSION

No sufficient reason having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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